

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HILDA L. SOLIS, Secretary)	09-CV-0988
of Labor, United States)	
Department of Labor,)	
)	
)	
Plaintiff,)	
)	
vs.)	
)	
JOHN J. KORESKO, V, et al,)	Philadelphia, PA
)	July 9, 2013
Defendants.)	1:36 p.m.
-----)	
REGIONAL EMPLOYERS' ASSURANCE)	03-CV-6903
LEAGUES VOLUNTARY EMPLOYEES')	
BENEFICIARY ASSOCIATION TRUST,)	
)	
Plaintiff,)	
)	
vs.)	
)	
GRETCHEN HUTTO CASTELLANO,)	
et al,)	
Defendants.)	
-----)	
HARRY R. LARKIN, ROBERT V.)	11-CV-7421
LARKIN,et al.,)	
)	
)	
Plaintiffs,)	
vs.)	
)	
PENN PUBLIC TRUST, et al,)	
)	
Defendants.)	
-----)	

MORGEN & OSWOOD CONSTRUCTION)
CO., INC., et al,)
) 13-CV-0666
Plaintiffs,)
)
vs.)
)
PENN PUBLIC TRUST, et al,)
)
Defendants.)

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff Hilda L. Solis:	JOANNE ROSKEY, ESQUIRE ASHTON S. PHILLIPS, ESQUIRE UNITED STATES DEPARTMENT OF LABOR, REGION III Office of the Solicitor 170 South Independence Mall West Suite 630 East The Curtis Center Philadelphia, PA 19106-3306
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I N D E XARGUMENT:PAGE

Re: Expansion of Interim Order

By Mr. Phillips

6

By Ms. Roskey

7

By Ms. Bakker

9

By Mr. Phillips

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1 (The following telephone conference proceedings were
2 heard at 1:36 p.m.)

3 THE COURT: Good afternoon, Counsel. It's Judge
4 McLaughlin speaking. I am happy to talk with you all. I am
5 in the middle of an evidentiary hearing, but I told them that
6 I need to do this first.

7 So I understand that for DOL, Mr. Phillips, you're
8 on, are you, sir?

9 MR. PHILLIPS: Yes, I am, Your Honor.

10 THE COURT: Okay. We are on the record, by the way.
11 And who -- is anybody with you? Ms. Roskey?

12 MS. ROSKEY: Yes, I am here, Your Honor.

13 THE COURT: Very good. And Ms. Bakker and Mr.
14 Martin?

15 MS. BAKKER: Yes, we're here.

16 MR. MARTIN: We're here, Your Honor.

17 THE COURT: Very good. And, Mr. Silverstein?

18 MR. SILVERSTEIN: I am here, Your Honor.

19 THE COURT: Anybody else represented? Okay. I
20 guess the insurance companies will be fine. They didn't have
21 much to say yesterday. I guess I didn't give them a chance,
22 did I? But in any event, go ahead, Mr. Phillips or Ms.
23 Roskey. I understand you wanted to, somehow, expand the
24 order.

25 By the way, I continued to think about things, and I

1 do have an order almost prepared that looks that same as the
2 other one, of course, with some additional statement as to why
3 I am making the decision I am making. But in terms of the
4 accounts, it's the same ones that I told you yesterday that I
5 would agree -- that I would take out those two or three.

6 But Ms. -- Mr. Phillips, you wanted to expand,
7 somehow. I got your letter, come to think of it. Let me look
8 at it. It's talking about, you want me to expand to prohibit
9 anymore loans being taken out, is that it?

10 MR. PHILLIPS: Yes, that is correct, Your Honor. In
11 our original proposed order that we had filed with the
12 application for the TRO, we had asked for all of the plan
13 assets to be frozen. And in the interim order, it was -- the
14 interim freeze order was limited just to bank accounts.

15 And, you know, of course yesterday, we had hoped
16 that we would be able --that -- that we would eventually see
17 an order to duplicate that would include the appointment of an
18 independent fiduciary and a bar on Mr. Koresko from accessing
19 plan assets, but, you know, we're not -- we are not sure that
20 that is going to happen, and in the case that it doesn't
21 happen, we have very, very serious concerns about the more
22 than 65 million dollars in cash value in life insurance
23 policies that Mr. Koresko referenced yesterday.

24 In the past, when he has lost access to the cash in
25 the trust accounts, he has found other ways to get access to

1 the plan's assets, specifically, by taking loans against the
2 insurance policies that are owned by the Trust, but of course,
3 these are the transactions that we talked about yesterday,
4 including the 35 million dollars in loans.

5 So he has represented that he has repaid somewhere
6 between 14 and 17 million dollars. And so, it appears to us
7 that it's uncontested that -- that those funds, in the absence
8 of an order barring Mr. Koresko from having control over the
9 insurance policies, he would be able to, again, take out loans
10 under the policies, and then have access to many millions of
11 dollars in plan assets, which we think might be inconsistent
12 with the spirit of the freeze order, so we wanted to bring
13 that to the Court's attention.

14 Sure, but let me just ask you, one thing you said,
15 as you started to talk, you said, when Mr. Koresko lost access
16 to the trust accounts, what did you mean by that?

17 MR. PHILLIPS: It -- it's --

18 MS. ROSKEY: Well, I can address that, Your Honor.
19 This is Ms. Roskey.

20 THE COURT: Sure.

21 MS. ROSKEY: When we were at an earlier phase of
22 this case, you'll recall that we went in for TRO when Mr.
23 Koresko attempted to fire F&M Trust, which was the successor
24 to CPC, as the trustee. That decision that Mr. Koresko made,
25 attempting to fire the trustee, took place in the end of the

1 summer of 2009.

2 We went in for a TRO, and it was during that TRO
3 proceeding, when Judge Jones had maintained the status quo,
4 and had kept F&M in control of the Trust for the duration of
5 the preliminary injunction hearing. It was during that time,
6 when Mr. Koresko had no access to the Trust, other than
7 through F&M, that these loans, these initial 34 million
8 dollars or loans, were taken.

9 So that's one instance where, you know, when -- when
10 he did not have a trustee that was cooperating with him, and
11 when he -- you know, prior to him becoming the trustee, the
12 source of -- the policies were the source of these loans, at
13 that time.

14 So we're very concerned that he's, again, in that
15 situation where the only access he has to the plan's funds are
16 through these loans.

17 THE COURT: Okay. I just don't -- I don't think I
18 had realized that the loans were taking place during the time
19 that there was not -- you know, where the trustee was, as you
20 said. Okay.

21 Ms. Bakker or Mr. Martin, is there an objection to
22 -- I can't imagine Mr. Koresko would be thinking of taking out
23 any loans at this point -- but so is there any objection to
24 putting in this provision that DOL is asking for?

25 MS. BAKKER: Yes, Your Honor, we do have several

1 objections, actually. First of all, the Department of Labor
2 has no evidence that the Koresko parties have taken any loans
3 from the insurance policies since the period that was from
4 August to October, 2009 that Ms. Roskey just described.

5 In fact, there is evidence to the contrary, because
6 the DOL has all of the Koresko parties' banking records
7 through, at least, January, 2013, and the DOL has not
8 identified any new loan proceeds, at all, going into the
9 Koresko parties' bank account since October of 2009. And in
10 fact, it is on the record, now, that those loans, from the
11 October, 2009 period, have already been significantly repaid.

12 So expanding the interim order to include the
13 insurance policies, in advance of the evidentiary hearing on
14 October 12, in our -- we believe it's premature.

15 Now, second, expanding the interim order to include
16 the insurance policies will cause extreme harm to the Koresko
17 parties in the form of an onslaught of defensive intervenor
18 and interpleader actions that the insurance companies will
19 then file.

20 Your Honor, also, has already had to deal with that
21 -- or maybe it was Judge Jones had to deal with that -- very
22 early in the case when Penn Mutual filed such an intervenor
23 action, although they ultimately withdrew it. But if -- if
24 this Court enters an order, basically freezing the insurance
25 policies, the insurance companies will have no choice but to

1 file those kinds of actions. And that will result in an
2 escalation of the Trust's litigation costs in defending those
3 actions. They'll have no choice.

4 THE COURT: Okay. Now --

5 MS. BAKKER: It's my memory --

6 THE COURT: Yes, go ahead.

7 MS. BAKKER: -- I'm sorry, Your Honor.

8 THE COURT: No, no. That's okay. Go ahead. I just
9 had a couple of questions about your two points, because I
10 wasn't quite sure I understood, but you finish up, Ms. Bakker.
11 I don't want to interrupt you.

12 Was there anything else, ma'am, you wanted to say?

13 MS. BAKKER: A couple more points.

14 THE COURT: Sure, yeah. No, no, go ahead. Yes,
15 absolutely.

16 MS. BAKKER: Already seen, in the -- so in
17 furtherance of my second point, we've already seen third
18 parties overreact to the Court's first interim order, freezing
19 the accounts for seven days. And that is in the form of what
20 Pershing did.

21 THE COURT: Right.

22 MS. BAKKER: Instead of freezing the account for
23 seven days, as required by the order, Pershing has now frozen
24 that account for five years.

25 THE COURT: Right. But let me just ask you -- and I

1 just don't understand -- why would saying he can't -- Mr.
2 Koresko can't take out anymore loans, cause an onslaught of
3 these defensive interpleader actions? I just am not
4 following.

5 MS. BAKKER: Your Honor, I think the concern is that
6 the insurance policies, because the Trust is the owner of the
7 policies, the trustee is the owner of the policies, and
8 because all of the governing plan documents place control and
9 authority with respect to the insurance policies, including
10 the right to access the cash value of those policies in the
11 form of policy loans, an interim order that freezes the
12 policies and calls into question the Koresko parties' rights
13 under those governing documents to control all the insurance
14 policies will cause a question from the insurance companies'
15 perspective, the question of who has the right to control
16 these policies?

17 THE COURT: Okay.

18 MS. BAKKER: They will, then, want to protect
19 themselves by filing, either intervener or interpleader
20 defensive actions to get guidance from the Court as to who has
21 the right to control the policies.

22 THE COURT: Okay. Well, again, I'm not sure I'm
23 following you, but let me just -- I'll hear from DOL on that
24 point in a minute, but before I get to them, let me ask you,
25 again, now, on your first point that he -- that Mr. Koresko

1 hasn't taken out loans since '09, but the assets haven't been
2 frozen since then. In other words, what Ms. Roskey just
3 explained about the timing with respect to who ever, FMC --
4 whoever came in or went out -- this was before Judge Jones, at
5 that point -- in terms of being a trustee, because he hasn't,
6 you know, I guess there hasn't, perhaps, been a need to, under
7 Ms. Roskey's theory, because he has had access to funds.

8 But now, that -- if they are now frozen, wouldn't
9 that be something -- a situation similar to what happened
10 before Judge Jones, and the potential, at least, for -- for
11 loans to be taken out, if Mr. Koresko doesn't have access to
12 the funds?

13 MS. BAKKER: The situation are similar, because of
14 the seven day freeze, and presumably, the new interim order
15 that will continue that freeze. But there's -- there's, as
16 you said, at the beginning of this call, there's no reason to
17 think that Mr. Koresko is, you know -- considering everything
18 that has happened between now and then, to think that he would
19 take any action with respect to those policies. It wouldn't
20 make any sense for him to do that, at this point.

21 THE COURT: No. Well, it would be a very, very
22 fool-hearty thing to do, but I'm wondering why he wouldn't
23 just agree? I mean, why does it matter, if he doesn't -- I
24 mean, why wouldn't he just agree, and say, you know, I'm not
25 going to do that? That's really why I raised it. But no, I

1 agree with you that it would be fool-hearty. But I suggest,
2 it --

3 MS. BAKKER: Well --

4 THE COURT: -- may have been fool-hearty to do a lot
5 of things that were, at least at this point, you know, on this
6 record, look like they were done, but --

7 MS. BAKKER: Well, but that's --

8 THE COURT: -- yeah, go ahead. Go ahead, ma'am.

9 MS. BAKKER: I don't mean to interrupt.

10 THE COURT: No. No, you're not. Go ahead.

11 MS. BAKKER: This actually goes to another point
12 that I was going to raise with respect to this request from
13 the DOL. I mean, we just received notice of this request from
14 the DOL to expand the interim order about two hours ago. We
15 haven't had an opportunity to even discuss it with Mr.
16 Koresko, much less try to obtain his agreement with respect to
17 their request.

18 So you know, the DOL keeps filing these things at
19 the last minute or -- in this case, even after the hearing,
20 and -- and so, you know, it -- it seems to us that they are
21 just constantly grappling and overreaching, to a certain
22 extent, in a -- in a way that is not really supported by the
23 current -- it makes it very difficult for us to respond in a
24 meaningful way.

25 THE COURT: Okay. No, I appreciate that point very

1 much. Okay. Ms. Roskey or Mr. Phillips, do you want to
2 respond to those three points, the first being, you know, he
3 hasn't -- Mr. Koresko hasn't done it since; it's unlikely he
4 will, since as I said, at least it would be fool-hearty?

5 Secondly, the concern about these new cases that would
6 pop up, and then thirdly, you know, the timing issue that,
7 come on, it's too late, at this point, to be adding to the
8 order, for all the reasons Ms. Bakker just said?

9 MS. BAKKER: Excuse me, Your Honor, I actually have
10 one additional point.

11 THE COURT: Sure.

12 MS. BAKKER: Do it now or later?

13 THE COURT: Sure. No, go ahead. Do it now.

14 MS. BAKKER: All right. My final point was that,
15 essentially a freeze like this will -- is unwarranted, because
16 it has to be demonstrated that the entire Trust is subject to
17 ERISA and subject to the Department of Labor's jurisdiction.
18 The Department of Labor has repeatedly acknowledged that
19 REALVEBA contains underlying arrangements that are not subject
20 to ERISA, because those arrangements do not cover any
21 employees. They only cover owner/participants.

22 Those employees on all of the insurance policies
23 under REALVEBA, when it has not been demonstrated that all of
24 those policies are either subject to ERISA or the Department
25 of Labor's authority or jurisdiction, it is overreaching at

1 this point.

2 THE COURT: Okay. That's another, I think very fair
3 point. Ms. Roskey or Mr. Phillips, and you can obviously each
4 take one or more of them or each talk about both of them. No
5 problem. Go ahead.

6 MR. PHILLIPS: Thank you, Your Honor. I'm sorry.
7 I'm hearing someone else's voice?

8 THE COURT: Oh, I did, too. Was that you, Mr.
9 Silverstein or Mr. Martin? You're the only two --

10 MR. SILVERSTEIN: It was not, Your Honor.

11 THE COURT: No?

12 MR. PHILLIPS: Okay.

13 THE COURT: Okay. Go ahead, Mr. Phillips.

14 MR. PHILLIPS: Sure. As to Ms. Bakker's first
15 point, I think Your Honor anticipated our response quite well.
16 The incentive, it was not -- has not been there, in the
17 interim, for Mr. Koresko to turn to the insurance policies for
18 access to cash.

19 As to her second point about the litigation
20 expenses, we have a couple of responses. One is that, these
21 same interests are at play as to the bank accounts. So
22 there's not really a principal basis for distinguishing
23 between the two. And because I think the strength of our
24 application is so high, and because we have put forward
25 documents -- documents showing that the Koresko defendants

1 aren't going to be -- are not able to restore the assets
2 they've already misappropriate to the plan, it's important
3 that these assets are frozen, and because there's such a
4 history and pattern here of misappropriating and malfeasance,
5 frankly, that it's important that all these assets are covered
6 by an interim order, which leads to the third point about the
7 timing.

8 It's not -- it's not, in my view, fair to
9 characterize it as some new relief that we're seeking. The
10 relief that we sought in our application, the relief that we
11 sought yesterday, was a package that included a bar on Mr.
12 Koresko from accessing plan assets. We're simply saying,
13 here, that to the extent that that bar is not forthcoming or
14 that the placement of an independent fiduciary is not
15 forthcoming, that the least relief that can be granted that's
16 going to insure meaningful protection to the plan and insure
17 the status quo is for the freeze to include this other body of
18 plans' assets.

19 As to the fourth point about the number of plans,
20 it's my understanding from what was stated yesterday that the
21 Koresko defendants are representing that there are 54 plans,
22 total, that are participating in this arrangement, and also
23 that there are 54 plans that, but for the 2009 non-owner
24 employee amendment, would have employees participating in
25 them.

1 Therefore, all of the plans that continue to exist
2 are covered by ERISA, and I'd be happy to address it --
3 address this issue further as to why we believe, even outside
4 that information, that the majority of the plans are likely
5 covered by ERISA, but first, let me make a legal point, which,
6 you know, this Court is well aware of. You've heard argument
7 on this issue, days of it and issued an 80 page decision that
8 talked about this at length.

9 But it's pertinent, here -- the plan documents
10 provide that all of the assets of the Trust are held co-
11 mingled, available to pay the benefits of any participant in
12 these plans. We've put forward documents showing that -- and
13 an affidavit showing 126 plans that are covered by ERISA, to
14 the extent that if any dollar in this Trust is misappropriated
15 by Mr. Koresko, there's an injury to any -- to all of the
16 ERISA covered plans.

17 And at this stage, where we're dealing with a
18 temporary restraining order, we are only -- it's not
19 appropriate to get into the specifics of these -- these
20 factual plans, of the facts as to coverage, because we are to
21 show, given the emergency nature of the relief needed, we show
22 that a likelihood of prevailing on the merits, which I believe
23 we have shown and a probability of irreparable harm, in the
24 absence of the relief requested.

25 THE COURT: Okay. Well, this is what I am going to

1 do, because I do need to get back to the courtroom. I'm going
2 to issue this afternoon the order that I had planned to,
3 without this language in it, in order to give Ms. Bakker a
4 chance to talk to her client and respond in writing. And I'm
5 wondering -- this just is occurring to me, as we're talking,
6 it may be that I could be comfortable, Ms. Bakker, if I had an
7 agreement, you know, that we don't even -- I mean, I don't
8 have to put it in the injunction, but just that Mr. Koresko
9 agrees that he will not seek to get any loans with respect to
10 these policies.

11 That would certainly cure your -- the onslaught, you
12 know, of new cases and, perhaps, some of the PR issues that
13 you're concerned about, and yet, you know, it would have Mr.
14 Koresko on record as saying that he will not do that. Ms.
15 Bakker, does that make sense for you to talk to Mr. Koresko
16 about that?

17 MS. BAKKER: We will most definitely address that
18 with him, Your Honor.

19 THE COURT: Okay. And then meanwhile, you know, get
20 back to me promptly, if you could, Ms. Bakker. It should be
21 by -- certainly, by tomorrow, I would expect you would be able
22 to get a hold of him in view of, you know, what we talked
23 about yesterday, his availability for the Trust.

24 And then, of course, Mr. Phillips, you all can
25 respond to that, as well, and if I think I need to talk to you

1 again, I know where to reach you. Okay. I think that's about
2 all I can do right now, because I do have to get back to
3 court, and I also want to get this order out.

4 Somebody was trying to speak, go right ahead.

5 MR. MARTIN: I was, Your Honor.

6 THE COURT: Yes?

7 MR. MARTIN: Richard Martin.

8 THE COURT: Yes, Mr. Martin?

9 MR. MARTIN: I -- before you go, and I know you're
10 -- you're in a hurry, but we have to bring this to your
11 attention. I mean, first of all, we're trying to deal with
12 this. We have summoned Mr. Koresko to our office, and he is
13 coming in here this afternoon.

14 I want to inform the Court that just minutes ago, we
15 were informed, through electronic filing, that Mr. Koresko,
16 without our knowledge or permission, has filed appeals from
17 the order of June 28th, which was mooted yesterday, but he
18 filed these appeals within the last hour, I guess, without our
19 permission or knowledge, and they are pending now, I guess.

20 I don't know. But we certainly intend to talk to
21 him about this, among other things. But I wanted Your Honor
22 to know it, at this point, for whatever it means. And I'm not
23 -- I haven't really given it much thought to find out what I
24 think it means at this point, but --

25 THE COURT: I appreciate that, Mr. Martin. Thank

1 you for telling me that. All right. Okay. Everybody, well,
2 all we can do is take it one step at a time, but I still will
3 allow -- as I just said, I would allow you to talk to your
4 client.

5 And then, Mr. Phillips, you can get back to me, you
6 know, promptly in response to the letter, if we don't get an
7 agreement, and then I'll just have to decide it, and I may
8 want to talk to you some more. But both of you have raised,
9 you know, good issues. And I will be mulling that over until
10 we resolve this.

11 Anything else that anybody needs to raise now?
12 Okay. Thanks very much, Counsel. I appreciate it.

13 (Proceedings concluded at 1:57 p.m.)

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C E R T I F I C A T I O N

I, Jacqueline Mullica, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

____ July 14, 2013

JACQUELINE MULLICA

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